IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1144 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANUBHAI BHANDUBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1144 of 1996

MR KG SHETH appointed advocate for appellant

MR UDAY BHATT APP for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 04/07/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. Instant appeal filed through jail under Section

374 of the Code of Criminal Procedure, 1973 ('the Code' for short) has been preferred by the appellant ('the accused' for short) against judgment and order dated September 30, 1996 of the learned Additional Sessions Judge, Himatnagar, by which the accused has been convicted for the offence punishable under Sections 302 and 498-A of the Indian Penal Code ('the IPC' for short) and has been sentenced to suffer R.I. for life and fine of Rs.1,000/- i.d., further R.I. for two months for the offence under section 302 of the IPC and R.I. for one year and fine of Rs.500/-, i.d., further R.I. for one month for the offence under Section 498-A of the IPC.

2. The accused was charged under Section 302 of the IPC for having committed murder of his wife - Chandrika by inflicting injuries on her neck with a knife at midnight on 7.10.1996 and so also under Section 498-A of the IPC for frequently demanding money from her and alleging against her chastity and thereby subjecting her to mental and physical cruelty. The case of the prosecution rested on the circumstantial evidence.

3. The case of the prosecution, in brief, was that:

3.1. The deceased was serving as ayah (ward female servant) in Himatnagar Civil Hospital for the last two years prior to the incident. She was residing on a rented premises, in a room of Joganiya temple, at Vaghela vas, Himatnagar. While she was working as an "Aangan vadi" worker at Kolad, Taluka Khedbrahma, she came in contact with the accused - Manubhai Parmar who was a resident of village Kajavas and at the relevant time residing at Aamba Mahuda Ashram near village Kajavas. As a result of the contact, both got married. This was the second marriage of the accused. The accused has one male child aged about 7 years out of the first marriage and out of the marriage with the Chandrikaben, there is one female child aged one year. Since the deceased was serving at Himatnagar, in Civil Hospital, the accused alongwith the deceased and two children came to Himatnagar and were residing at Himatnagar.

3.2. It is further alleged that the accused was not doing any service or business. But as he was knowing only driving he was earning by driving vehicle in piecemeal. According to the prosecution case, the accused was a spendthrift, therefore, he frequently demanded money from the salary of the deceased and if the demand is not acceded to, she was subjected to beating and harassment at the hands of the accused. The aforesaid attitude of the accused was conveyed to

Vikrambhai Mavjibhai, a brother of the deceased.

3.3. As per the prosecution case, on 8.10.1994, at 2 P.M. when the brother of the deceased was in his office, a Sanitary Inspector, Prajapati came from the Civil Hospital and informed him that his sister Chandrika had not reported for duty and she was lying in dead condition. On receipt of the said information, he went to the house of his sister Chandrikaben, situated at Vaghela Vas. The house was found locked from outside and, therefore, policemen, in presence of Panchas, broken open the lock of the room and in the room they found his sister lying dead. The deceased had injuries on her neck. Her neck was cut with sharp-edged weapon. The blood was frozen outside. The accused was not found in the house. The aforesaid incident was reported to Himatnagar Town Police station. Therefore, as per the prosecution case, the accused had committed the offence of murder of his wife by inflicting injuries on her neck during the night hours of 7.10.1994. For the aforesaid incident, a complaint came to be filed by Vikrambhai Mavjibhai Pandor, at Himatnagar Police Station. The said complaint was registered, which is on record at Ex.34.

3.4. On the basis of the aforesaid complaint, investigation was put into motion. Statements of various witnesses were recorded, Panchnama of the scene of the offence was prepared. Inquest Panchnama was also drawn. Recovery panchnama of the muddamal knife, cloth put on by the accused and the key of the house were recovered from the accused. Thereafter the dead-body was sent for autopsy. After getting the autopsy report, as offence was divulged against the accused for the offences under sections 302 and 498 of the IPC, a charge-sheet was filed against him. On committal, the charge was framed by the learned Additional Sessions Judge, Himatnagar against the accused which was denied by him and claimed to be tried. Thereupon he was put to trial in Sessions Case No.55 of 1995.

4. As noticed earlier, the case of the prosecution rested on circumstantial evidence. To prove the culpability of the accused by establishing complete chain of circumstances, the prosecution has examined in all 11 witnesses. The prosecution has also produced documents upon which heavy reliance was placed.

5. After recording the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained the circumstances found against him in the evidence of the prosecution witnesses and recorded the

further statement of the accused as required under Section 313 of the Code. In his further statement also the accused denied the case of the prosecution in toto but did not lead any evidence in support of his defence nor examined himself on oath. However, he reiterated that at the relevant time he was not residing with the deceased at Himatnagar but he was residing at his native villave Kajavas as both his children were small. He also stated that there were no quarrel between him and the deceased and he eke out his livelihood by doing driving work.

6. On appreciation and evaluation of the evidence adduced by the prosecution, the learned trial Judge held that as chain of circumstances is complete, the prosecution has proved the case against the accused for commission of murder of his wife Chandrika beyond doubt and, therefore, the charge levelled against the accused was proved.

7. For coming to the said conclusion, the learned trial Judge relied upon the following circumstances:

(i) Homicidal death of the deceased Chandrika was proved.

(ii) Though all the witnesses who were residing in the near vicinity of the house wherefrom the dead-body of Chandrika was found, have turned hostile, from a part of their evidence the presence of the accused in the house of the deceased on the previous day of the incident was established.

(iii) It was also established that the accused and deceased were frequently quarrelling.

(iv) The door of the house was locked from outside. There were no doors except the main door and the key of the lock was found from the accused. It clearly established that the accused had committed the crime and thereafter he locked the door from outside and went away.

8. On the aforesaid chain of circumstances, the learned trial Judge believed the case of the prosecution and the accused was found guilty and resultantly he recorded the order of conviction and sentence giving rise to the present appeal.

9. Mr. K.G. Sheth, learned advocate appointed for the appellant, contended that there was no evidence worth the name to consider as there was no link of

circumstantial evidence. According to him, the alleged motive was not established by the prosecution. All the witnesses examined by the prosecution turned hostile and from their evidence it was not established that the accused was residing in the same house where the dead-body of the deceased was found. According to him, there was ample evidence to the effect that the accused was residing at his native place Kajavas together with his two minor children. So far as the evidence on record with regard to the non-cordial relation of the accused with deceased is concerned, there was no evidence worth the name to consider. According to him, recovery of the muddamal knife, cloth put on by the accused at the relevant time and the key of the lock which was broken open was not establish as both the panchas turned hostile. According to the learned advocate, the judgment and order which is impugned in the appeal is recorded without any evidence and, therefore, the same is deserved to be quashed and set aside by holding the accused not guilty to the charge levelled against him. He, therefore, urged to allow this appeal and thereby acquit the accused of the offence with which he was charged.

10. Mr. Uday Bhatt, learned APP, has supported the impugned judgment and order throughout. According to him, the learned trial Judge has very rightly recorded the order of conviction and sentence as there was ample evidence on record to connect the accused with the crime on the basis of the circumstantial evidence which have been highlighted in the impugned judgment. According to him, though the witnesses have turned hostile, part of their evidence can be believed and acted upon. There is no rule of law that the evidence of the hostile witnesses should be treated as effaced or washed off the record altogether but part of their evidence which is otherwise acceptable can be acted upon. Besides this, the contradictions of the evidence of the hostile witnesses have been proved by the evidence of the Investigating Officer. There is no reason to disbelieve the evidence of the Investigating Officer. According to him, even though the Panchas have turned hostile, the Investigating Officer has categorically stated that the muddamal articles i.e., knife, cloth and key were recovered from the accused and, therefore, part of the evidence has been rightly believed by the learned trial Judge. According to the learned APP, the learned trial Judge has very rightly come to the conclusion that the chain of circumstantial evidence connecting the accued with the crime are established, therefore, the learned trial Judge has rightly held the accused guilty of the charge levelled against him and hence there is no room to

interfere with the impugned judgment and order in this appeal. He, therefore, urged to dismiss the appeal.

11. We have considered he submissions advanced by the learned advocates appearing for the parties. We have also perused the impugned judgment and order, the set of evidence and the record and proceedings of the Sessions Case No.55 of 1995 which have been called for by this Court while admitting the appeal.

12. There is no manner of doubt that this case is based on the circumstantial evidence as there is no eye witness. It is settled principle of law that in order to sustain conviction on the basis of circumstantial evidence, prosecution must fulfil three conditions:

> "(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
> (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
> (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. Further in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused."

The above principles are laid down by the Supreme Court in the case of Jaharlal Das v. State of Orissa, AIR 1991 SC 1388.

13. It is also one of the settled principles of law that witnesses may tell lie but not circumstances. The Court must adopt cautious approach for basing conviction on circumstantial evidence. The Supreme Court has reiterated it in the case of State of Haryana v. Ved Prakash, AIR 1994 SC 468.

14. The Supreme Court in the case of Ramkumar Madhusudan Pathak v. State of Gujarat, (1998) 7 SCC 702 has aptly and elaborately laid down the principles as to which are the circumstances establishing guilt of the accused.

15. The Supreme Court in the very well known case of Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622 has laid down following five principles to base conviction on the circumstantial evidence:

> "(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may' be established;
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> (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
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> (iii) the circumstances should be of a conclusive nature and tendency;
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> (iv) they should exclude every possible hypothesis except the one to be proved, and
>
> (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

16. In the latest decision of the Supreme Court in the case of Jaipal v. State of Haryana, (2003) 1 SCC 169, S.C. has held that merely because the accused could have had a motive for causing death of the deceased it would not by itself be enough to sustain the finding of guilt against him.

17. Keeping in mind the principles clearly elucidated in the above referred to judgments, we may now avert to the evidence adduced by the prosecution to find out whether the prosecution has successfully established the chain of circumstantial evidence to connect the accused with the crime and to base conviction on the circumstantial evidence adduced by it.

18. So far as the homicidal death is concerned, there is no dispute even by the defence that the deceased died homicidal death. According to us also the prosecution has by leading cogent and convincing evidence of Dr. Manishbhai Amraji, P.W.1, Ex.10, who performed the autopsy on the dead-body and the autopsy report issued by him which is at Ex.12, duly proved that the deceased died homicidal death on account of the injuries received by her on vital organs in the neck like blood vessels, trachea, etc.

19. To establish the guilt of the accused, the circumstances that the prosecution had pitted against the accused were that the accused and the deceased had an affair marriage and after marriage, the accused with his son begotten from his previous wife and with the daughter born out of the wedlock of the accused and deceased, started residing at Himatnagar as the deceased was serving as an ayah in the Civil Hospital at Himatnagar. According to the prosecution, the accused was not doing any business or service except driving vehicles on temporary basis. As the accused was not having sufficient means to meet with his expenses, he was frequently demanding money from the deceased and if the deceased refused to give him money he used to harass her and beating her. The sum and substance of the evidence is that relation of the accused with the deceased was not cordial.

20. To establish this main circumstance, the prosecution has examined the complainant - Vikram Mavji Pandor, P.W.2, Ex.14 who is the brother of the deceased. In his examination-in-chief he stated the things what he had narrated in the complaint Ex.34 which was filed by him and according to him, relation of the accused with the deceased was not cordial and the accused was residing with the deceased at Vaghela vas, Himatnagar. According to his evidence, on receipt of the information about the death of his sister, he went to her house where he found crowd of about 15 to 20 with policemen. They broke open the lock and entered in the house where they saw the dead-body of the deceased. In cross-examination, he

denied that his sister was staying all alone in the said house. He also denied the suggestion that after the birth of the female child the accused was staying at his native place Kajavas. From the evidence of Vikrambhai Mavjibhai, it is successfully established that the accused was residing with the deceased at the relevant time at Himatnagar and the house was locked from outside and the dead-body was found inside the house. It may be noted that as per the panchnama of the scene of the offence, the house where the dead-body was found was having only one front door and, therefore, there was no possibility of somebody entering from any other door and killing the deceased Chandrikaben.

21. Thereafter the prosecution examined Rajubhai Fakabhai Vaghela, P.W.3, Ex.15, Kodiben Maganbhai Vaghela, P.W.4, Ex.16, Dahiben Nanubhai Vaghela, P.W.6, Ex.18 and Maniben Fakirbhai Prajapati, P.W.7, Ex.19. It may be noted that notwithstanding the fact that all of them have not supported part of the prosecution case, they were consistent in their version with regard to the fact that the accused was staying with the deceased at the relevant time alongwith two children. It is settled principles of law that part of the evidence of the hostile witness which is otherwise acceptable can be acted upon and his evidence cannot be treated as effaced or washed off the record altogether. (See Khujji alias Surendra Tiwari v. State of MP, AIR 1991 SC 1853).

22. In view of the aforesaid evidence of the four prosecution witnesses who were residing in the immediate vicinity and who have unequivocally stated that at the relevant time the accused was residing with the deceased with two children, and he was found with the deceased on last night, in our opinion, it is a strong circumstance to connect the accused with the crime.

23. The prosecution thereafter examined Rameshbhai Bhikhabhai Patel, P.W.9, Ex.21 and Ramabhai Kodarbhai Parmar, P.W.10, Ex.27 to prove the recovery panchnama of knife, cloth put on by the accused at the relevant time and the key, which is produced at Ex.22. The Panchas have not supported the contents of the Panchnama. Therefore the prosecution tried to establish the contents of the Panchnama with the evidence of the investigating officer.

24. The investigating officer Rameshchandra Bhagabhai Patel, P.W.11, Ex.33, unequivocally deposed before the trial court that in the presence of both the panchas muddamal articles knife, cloth and the key were recovered

from the accused and both the panchas put their signature beneath the panchnama. It may be noted that there was no cross-examination of the investigating officer to suggest that there was enmity between the accused and the investigating officer which would impeach the credibility of his evidence. Therefore, according to us, there is no reason to disbelieve the evidence of the investigating officer.

25. In view of the evidence which we have discussed in the foregoing paragraphs, we are of the considered opinion that the following tell-tale circumstances unerringly pointing to the guilt of the accused:

(i) Deceased Chandrikaben died homicidal death on account of the injuries received by her on her neck, with knife, during night hours.

(ii) Relation of the accused with the deceased was not cordial. The accused used to harass the deceased and she was subjected to mental and physical cruelty when she had not succumbed to the demand for money made by the accused.

(iii) After their marriage, the accused and the deceased alongwith their two children used to reside in the very house at Vaghela Vas, Himatnagar.

(iv) On the last day of the incident, the accused was in the said house.

(v) The house was having only one front door which was closed and lock was applied from outside the door. There was no possibility of some outsider coming in the house and committing the crime.

(vi) The key of the lock was found from the possession of the accused in the presence of the panchas. Though the panchas have not supported the prosecution case, the Investigating Officer has unequivocally stated that the said key was recovered from the accused after preparing recovery panchnama.

(vii) The version of the accused in his further statement that at the relevant time he was residing at his naive place Kajavas alongwith his two children has not been corroborated with any evidence.

26. In view of the above, we are in complete agreement with the finding recorded and ultimate conclusion arrived at by the learned trial Judge for convicting the accused and according to us no other view is possible except the view taken by the learned trial Judge.

27. In aforesaid view of the matter, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the learned trial Judge.

28. In the wake up of the above, we are not inclined to interfere with the impugned judgment and order of conviction and sentence recorded by the learned trial Judge and hence the appeal lacks merit and deserves to be dismissed and thereby the order of conviction and sentence deserves to be maintained and upheld.

29. For the foregoing reasons, the appeal fails and accordingly it is dismissed.

(A.R. Dave, J.)

(A.M. Kapadia, J.)

(karan)